

WT 03-217

FCC 603	<b>FCC Wireless Telecommunications Bureau</b> <b>Application for Assignments of Authorization</b> <b>and Transfers of Control</b>	Approved by OMB 3060 - 0800 See instructions for public burden estimate  Submitted 09/26/2003 at 06:55PM  File Number: <b>0001461949</b>
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1) Application Purpose <b>Assignment of Authorization</b>	
2a) If this request is for an Amendment or Withdrawal, enter the File Number of the pending application currently on file with the FCC	File Number:
2b) File numbers of related pending applications currently on file with the FCC	

**Type of Transaction**

3a) Is this a <i>pro forma</i> assignment of authorization or transfer of control? <b>No</b>
3b) If the answer to Item 3a is 'Yes', is this a notification of <i>pro forma</i> transaction being filed under the Commission's forbearance procedures for telecommunications licenses?
4) For assignment of authorization only, is this a partition and/or disaggregation? <b>Yes</b>
5a) Does this filing request a waiver of the Commission rules? If 'Yes', attach an exhibit providing the rule numbers and explaining circumstances <b>Yes</b>
5b) If a feeable waiver request is attached, multiply the number of stations (call signs) times the number of rule sections and enter the result
6) Are attachments being filed with this application? <b>Yes</b>
7a) Does the transaction that is the subject of this application also involve transfer or assignment of other wireless licenses held by the assignor/transferor or affiliates of the assignor/transferor (e.g., parents, subsidiaries, or commonly controlled entities) that are not included on this form and for which Commission approval is required? <b>Yes</b>
7b) Does the transaction that is the subject of this application also involve transfer or assignment of non-wireless licenses that are not included on this form and for which Commission approval is required? <b>No</b>

**Transaction Information**

8) How will assignment of authorization or transfer of control be accomplished? <b>Sale or other assignment or transfer of stock</b> If required by applicable rule, attach as an exhibit a statement on how control is to be assigned or transferred, along with copies of any pertinent contracts, agreements, instruments, certified copies of Court Orders, etc
9) The assignment of authorization or transfer of control of license is <b>Voluntary</b>

**Licensee/Assignor Information**

10) FCC Registration Number (FRN) <b>0002964922</b>			
11) First Name (if individual)	MI	Last Name	Suffix
12) Entity Name (if not an individual) <b>NextWave Personal Communications, Inc.</b>			
13) Attention To <b>Michael R Wack</b>			
14) P O Box	And / Or	15) Street Address <b>601 13th Street, NW, North Tower, Suite 320</b>	
16) City <b>Washington</b>	17) State <b>DC</b>	18) Zip Code <b>20005</b>	
19) Telephone Number <b>(202)661-2083</b>	20) FAX Number <b>(202)347-2822</b>		
21) E-Mail Address <b>mwack@nextwavetel.com</b>			

22) Race, Ethnicity, Gender of Assignor/Licensee (Optional)

<b>Race:</b>	American Indian or Alaska Native.	Asian	Black or African-American	Native Hawaiian or Other Pacific Islander.	White:
<b>Ethnicity:</b>	Hispanic or Latino	Not Hispanic or Latino.			
<b>Gender:</b>	Female	Male			

**Transferor Information** (for transfers of control only)

23) FCC Registration Number (FRN)			
24) First Name (if individual).	MI	Last Name	Suffix
25) Entity Name (if not an individual)			
26) P O Box	And / Or	27) Street Address	
28) City	29) State	30) Zip Code	
31) Telephone Number.		32) FAX Number:	
33) E-Mail Address.			

**Name of Transferor Contact Representative**(if other than Transferor) (for transfers of control only)

34) First Name	MI	Last Name	Suffix
35) Company Name			
36) P O Box:	And / Or	37) Street Address	
38) City	39) State	40) Zip Code	
41) Telephone Number		42) FAX Number:	
43) E-Mail Address			

**Assignee/Transferee Information**

44) The Assignee is a(n) <b>Limited Liability Corporation</b>			
45) FCC Registration Number (FRN) <b>0004205977</b>			
46) First Name (if individual)	MI	Last Name	Suffix
47) Entity Name (if other than individual) <b>BellSouth Personal Communications, LLC</b>			
48) Name of Real Party in Interest			49) TIN <b>L00233205</b>
50) Attention To <b>Kellye E. Abernathy</b>			
51) P O Box:	And / Or	52) Street Address <b>17330 Preston Road, Suite 100A</b>	
53) City <b>Dallas</b>	54) State <b>TX</b>	55) Zip Code <b>75252</b>	
56) Telephone Number <b>(972)733-2000</b>		57) FAX Number: <b>(972)733-2865</b>	
58) E-Mail Address			

**Name of Assignee/Transferee Contact Representative**(if other than Assignee/Transferee)

59) First Name <b>David</b>	MI <b>G</b>	Last Name <b>Richards</b>	Suffix
60) Company Name <b>Cingular Wireless LLC</b>			
61) P O Box	And / Or	62) Street Address <b>5565 Glenridge Connector, Suite 1700</b>	
63) City <b>Atlanta</b>	64) State <b>GA</b>	65) Zip Code <b>30342</b>	
66) Telephone Number <b>(404)236-5543</b>		67) FAX Number <b>(404)236-5575</b>	
68) E-Mail Address			

**Alien Ownership Questions**

69) Is the Assignee or Transferee a foreign government or the representative of any foreign government?	No
70) Is the Assignee or Transferee an alien or the representative of an alien?	No
71) Is the Assignee or Transferee a corporation organized under the laws of any foreign government?	No
72) Is the Assignee or Transferee a corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country?	No
73) Is the Assignee or Transferee directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? If 'Yes', attach exhibit explaining nature and extent of alien or foreign ownership or control	No

### Basic Qualification Questions

74) Has the Assignee or Transferee or any party to this application had any FCC station authorization, license or construction permit revoked or had any application for an initial, modification or renewal of FCC station authorization, license, construction permit denied by the Commission? If 'Yes', attach exhibit explaining circumstances.	No
75) Has the Assignee or Transferee or any party to this application, or any party directly or indirectly controlling the Assignee or Transferee, or any party to this application ever been convicted of a felony by any state or federal court? If 'Yes', attach exhibit explaining circumstances.	No
76) Has any court finally adjudged the Assignee or Transferee, or any party directly or indirectly controlling the Assignee or Transferee guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement, or any other means or unfair methods of competition? If 'Yes', attach exhibit explaining circumstances	No
77) Is the Assignee or Transferee, or any party directly or indirectly controlling the Assignee or Transferee currently a party in any pending matter referred to in the preceding two items? If 'Yes', attach exhibit explaining circumstances.	Yes

### 78) Race, Ethnicity, Gender of Assignee/Transferee(Optional)

<b>Race:</b>	American Indian or Alaska Native	Asian	Black or African-American	Native Hawaiian or Other Pacific Islander.	White.
<b>Ethnicity:</b>	Hispanic or Latino	Not Hispanic or Latino			
<b>Gender:</b>	Female	Male			

### Assignor/Transferor Certification Statements

1) The Assignor or Transferor certifies either (1) that the authorization will not be assigned or that control of the license will not be transferred until the consent of the Federal Communications Commission has been given, or (2) that prior Commission consent is not required because the transaction is subject to streamlined notification procedures for <i>pro forma</i> assignments and transfers by telecommunications carriers. See <i>Memorandum Opinion and Order</i> , 13 FCC Rcd 6293(1998)			
2) The Assignor or Transferor certifies that all statements made in this application and in the exhibits, attachments, or in documents incorporated by reference are material, are part of this application, and are true, complete, correct, and made in good faith			
79) Typed or Printed Name of Party Authorized to Sign			
First Name <b>Michael</b>	MI. <b>R</b>	Last Name <b>Wack</b>	Suffix.
80) Title <b>Senior VP &amp; Deputy General Counsel</b>			
Signature <b>Michael R Wack</b>		81) Date <b>09/26/03</b>	

### Assignee/Transferee Certification Statements

1) The Assignee or Transferee certifies either (1) that the authorization will not be assigned or that control of the license will not be transferred until the consent of the Federal Communications Commission has been given, or (2) that prior Commission consent is not required because the transaction is subject to streamlined notification procedures for <i>pro forma</i> assignments and transfers by telecommunications carriers. See <i>Memorandum Opinion and Order</i> , 13 FCC Rcd 6293 (1998).
2) The Assignee or Transferee waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application.
3) The Assignee or Transferee certifies that grant of this application would not cause the Assignee or Transferee to be in violation of any pertinent cross-ownership, attribution, or spectrum cap rule. *If the applicant has sought a waiver of any such rule in connection with this application, it may make this certification subject to the outcome of the waiver request.
4) The Assignee or Transferee agrees to assume all obligations and abide by all conditions imposed on the Assignor or Transferor under the subject authorization(s), unless the Federal Communications Commission pursuant to a request made herein otherwise allows, except for liability for any act done by, or any right accrued by, or any suit or proceeding had or commenced against the Assignor or Transferor prior to this assignment.
5) The Assignee or Transferee certifies that all statements made in this application and in the exhibits, attachments, or in documents incorporated by reference are material, are part of this application, and are true, complete, correct, and made in good faith.
6) The Assignee or Transferee certifies that neither it nor any other party to the application is subject to a denial of Federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1998, 21 U.S.C. § 862, because of a conviction for possession or distribution of a controlled substance. See Section 1.2002(b) of the rules, 47 CFR § 1.2002(b), for the definition of "party to the application" as used in this certification.
7) The applicant certifies that it either (1) has an updated Form 602 on file with the Commission, (2) is filing an updated Form 602 simultaneously with this application, or (3) is not required to file Form 602 under the Commission's rules.

**82) Typed or Printed Name of Party Authorized to Sign**

First Name Carol	MI L	Last Name Tacker	Suffix:
83) Title V.P. - Asst. Gen. Counsel & Corp. Sec.			
Signature Carol L Tacker		84) Date 09/26/03	
WILLFUL FALSE STATEMENTS MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, Section 1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503).			

**Authorizations To Be Assigned or Transferred**

85) Call Sign	86) Radio Service	87) Location Number	88) Path Number (Microwave only)	89) Frequency Number	90) Lower or Center Frequency (MHz)	91) Upper Frequency (MHz)	92) Constructed Yes / No	93) Assignment Indicator
KNLF693	CW							

<b>FCC Form 603 Schedule A</b>	<b>Schedule for Assignments of Authorization and Transfers of Control in Auctioned Services</b>	Approved by OMB 3060 - 0800 See instructions for public burden estimate
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### Assignments of Authorization

#### 1) Assignee Eligibility for Installment Payments (for assignments of authorization only)

Is the Assignee claiming the same category or a smaller category of eligibility for installment payments as the Assignor (as determined by the applicable rules governing the licenses issued to the Assignor)?
If 'Yes', is the Assignee applying for installment payments?

#### 2) Gross Revenues and Total Assets Information (if required) (for assignments of authorization only)

Refer to applicable auction rules for method to determine required gross revenues and total assets information

Year 1 Gross Revenues (current)	Year 2 Gross Revenues	Year 3 Gross Revenues	Total Assets:
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#### 3) Certification Statements

##### For Assignees Claiming Eligibility as an Entrepreneur Under the General Rule

Assignee certifies that they are eligible to obtain the licenses for which they apply
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##### For Assignees Claiming Eligibility as a Publicly Traded Corporation

Assignee certifies that they are eligible to obtain the licenses for which they apply and that they comply with the definition of a Publicly Traded Corporation, as set out in the applicable FCC rules.
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##### For Assignees Claiming Eligibility Using a Control Group Structure

Assignee certifies that they are eligible to obtain the licenses for which they apply.
Assignee certifies that the applicant's sole control group member is a pre-existing entity, if applicable.

##### For Assignees Claiming Eligibility as a Very Small Business, Very Small Business Consortium, Small Business, or as a Small Business Consortium

Assignee certifies that they are eligible to obtain the licenses for which they apply
Assignee certifies that the applicant's sole control group member is a pre-existing entity, if applicable

##### For Assignees Claiming Eligibility as a Rural Telephone Company

Assignee certifies that they meet the definition of a Rural Telephone Company as set out in the applicable FCC rules, and must disclose all parties to agreement(s) to partition licenses won in this auction. See applicable FCC rules.
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### Transfers of Control

#### 4) Licensee Eligibility (for transfers of control only)

As a result of transfer of control, must the licensee now claim a larger or higher category of eligibility than was originally declared?
If 'Yes', the new category of eligibility of the licensee is

#### Certification Statement for Transferees

Transferee certifies that the answers provided in Item 4 are true and correct
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<b>FCC Form 603 Schedule B</b>	<b>Partition and Disaggregation Schedule</b>	Approved by OMB 3060 - 0800 See instructions for public burden estimate
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1) Partitioner/Disaggregator Call Sign <b>KNLF693</b>
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**Geographic Area Partitioned**

2) Defined Area to be Partitioned	3) Undefined Area to be Partitioned (Complete undefined geographic area attachment)	4) Population of Partitioned Area
Schedule C # Attached		

**5) Spectrum Disaggregated (in MHz)**

Spectrum Disaggregated	
Lower Frequency	Upper Frequency
01895.00000	01900.00000
01975.00000	01980.00000

**6) Coverage Requirements - Partitioning**

(No) Option 1	Partitioner and Partitionee each certify that they will be subject to the same coverage requirements for their respective partitioned areas
(No) Option 2	Partitioner certifies that the 5 year coverage requirements have been or will be met and that the 10 year coverage requirements must be met for the entire license area Partitionee certifies that only the substantial service requirement for renewal expectancy for the partitioned area must be met by the end of the 10 year license term

**7) Coverage Requirements - Disaggregation**

(No) Option 1	Disaggregator and Disaggrantee each certify that the Disaggregator will maintain responsibility for meeting the applicable coverage requirements for the entire license area
(No) Option 2	Disaggregator and Disaggrantee each certify that the Disaggrantee will maintain responsibility for meeting the applicable coverage requirements for the entire license area
(Yes) Option 3	Disaggregator and Disaggrantee each certify that they will share responsibility for meeting the applicable coverage requirements for the entire license area.

The copy resulting from Print Preview is intended to be used as a reference copy only and MAY NOT be submitted to the FCC as an application for manual filing
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**Attachment List**

Attachment Type	Date	Description	Contents
Other	09/26/03	EXHIBIT 1	<a href="#">0178732729178654164727755.pdf</a>
Other	09/26/03	ATTACHMENT 1 TO EXHIBIT 1	<a href="#">0178732739178654164727755.pdf</a>
Other	09/26/03	EXHIBIT 2	<a href="#">0178732749178654164727755.pdf</a>
Other	09/26/03	EXHIBIT 3	<a href="#">0178732759178654164727755.pdf</a>
Other	09/26/03	EXHIBIT 4	<a href="#">0178732769178654164727755.pdf</a>

**DESCRIPTION OF TRANSACTION,  
PUBLIC INTEREST STATEMENT AND WAIVER REQUEST**

**I. INTRODUCTION**

In these thirteen related and simultaneously-filed applications, NextWave Personal Communications Inc. and NextWave Power Partners Inc. (together with NextWave Telecom Inc. and NextWave Partners Inc., collectively referred to herein as "NextWave"), and subsidiaries of Cingular Wireless LLC ("Cingular") (NextWave and Cingular together referred to herein as the "Applicants") seek Commission approval for the assignment from NextWave to Cingular of those C and F Block Personal Communications Services ("PCS") licenses set forth below.<sup>1</sup> The Applicants have entered into a Purchase Agreement dated August 4, 2003 among the parties (the "Purchase Agreement"), a copy of which (together with all schedules and exhibits thereto) is contained in Exhibit 2 to these applications. At the same time the Purchase Agreement was executed, NextWave, the United States Government (on behalf of the Commission), BFD Communications Partners, LP (the "DIP Lender") and the Official Committee of Unsecured Creditors appointed in the NextWave bankruptcy proceedings (the "NextWave Creditors' Committee") entered into a "Term Sheet for Agreement Regarding the §363 Sale of Rights and Interests in Certain Licenses" (the "Term Sheet"), which includes mutual releases and other terms affecting the proposed transaction. (The Term Sheet is attached as Exhibit 3 to these applications.) Because NextWave is in the process of reorganizing under protection of the bankruptcy laws, the U.S. Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") has reviewed and approved both the Purchase Agreement and the Term Sheet, and entered a "Sale Order."<sup>2</sup> In addition, the United States Department of Justice ("Department") has approved the Term Sheet in its entirety in accordance with its authority under the Debt Collection Improvement Act of 1996.<sup>3</sup>

Due to a complex set of circumstances, spectrum licensed to NextWave has not been used to deliver widespread commercial wireless communications to the public. The proposed

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<sup>1</sup> The specific Cingular subsidiaries designated as assignees are identified in Section II below, and individual applications and licenses are identified in Section III below. No microwave stations or international authorizations are to be assigned

<sup>2</sup> See Order Under 11 U.S.C. §§ 105, 363 and 1146(c) of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 6004 and 9019 (A) Approving the Terms and Conditions of an Agreement for the Sale of the Debtors' Rights and Interests in Certain Designated Licenses; (B) Authorizing the Sale Free and Clear of All Liens, Claims and Encumbrances, Subject Only to FCC Regulatory Review and Approval and HSR Approval; (C) Authorizing Debtors to Satisfy Certain Secured Indebtedness Related to Such Licenses, and (D) Approving Settlement and Releases Between the Debtors and the FCC with Respect to Claims Related to Such Designated Licenses (entered September 25, 2003 in the United States Bankruptcy Court for the Southern District of New York) ("Bankruptcy Sale Order"). The transactions contemplated herein are subject to the Commission's regulatory review and approval of these applications pursuant to Section 310(d) of the Communications Act.

<sup>3</sup> See 31 U.S.C. § 3711 and 31 C.F.R. § 902.1 The Department confirmed its approval of the Term Sheet at hearings before the Bankruptcy Court on August 21, 2003 and September 25, 2003

transaction will enable a portion of that spectrum to be put into immediate commercial use to benefit wireless consumers – an outcome that unquestionably is in the public interest.

This transaction raises no competitive concerns for the Commission. It will not cause a reduction in existing competition and it will enable Cingular to offer more effective competition through the improvement of the services it offers to consumers.

As discussed below, consummation of the proposed transaction may require that certain rule waivers be granted. The Applicants will demonstrate that the public interest will be well served by grant of the requested waivers and by approval of the proposed transaction

## II. DESCRIPTION OF THE PARTIES

### A. NextWave

The assignors in this transaction are NextWave Personal Communications Inc. ("NPCI") and NextWave Power Partners Inc ("NPPI"). NPCI holds C block PCS licenses obtained in connection with FCC Auctions 5 and 10, and NPPI holds D, E, and F block PCS licenses obtained in connection with FCC Auction 11. NPCI is a direct wholly-owned subsidiary of NextWave Telecom Inc ("NTI"). NTI was formed in 1995 to provide PCS services, including high-speed Internet access, to consumer and business markets. NextWave Power Partners, which holds a 100 percent interest in NPPI, also is a wholly-owned subsidiary of NTI. An FCC Form 602 providing ownership information for NTI and its subsidiaries is on file with the Commission.

### B. Cingular

The assignees in this transaction are. BellSouth Mobility LLC, BellSouth Personal Communications, LLC, Corpus Christi SMSA Limited Partnership, Florida Cellular Service, LLC, Houston Cellular Telephone Company, L.P., Pacific Bell Wireless Northwest, LLC, Pacific Telesis Mobile Services, LLC, SBC Wireless LLC, Southwestern Bell Mobile Systems, LLC, and Southwestern Bell Wireless, LLC. All assignees are direct or indirect wholly-owned subsidiaries of Cingular. Cingular, a nationwide commercial wireless carrier, is jointly owned by SBC Communications Inc. and BellSouth Corporation. Cingular's qualifications to hold licenses are a matter of public record.<sup>4</sup> As the Commission is aware, Cingular has the technical and operational expertise to hold and control FCC licenses and is financially qualified and has adequate resources to undertake and consummate the transaction. FCC Form 602s providing ownership information for Cingular and its wholly-owned affiliates are on file.<sup>5</sup>

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<sup>4</sup> See, e.g., *Applications of SBC Communications, Inc. and BellSouth Corp.*, 15 FCC Rcd 25459, 25463, 25466 (WTB/IB 2000).

<sup>5</sup> Based on the prior guidance from the Wireless Telecommunications Bureau, the Form 602 for Cingular satisfies the ownership reporting requirements of Sections 1.919 and 1.2112(a) of the Commission's rules for the assignees that are wholly-owned subsidiaries of Cingular. See 47 C.F.R. §§ 1.919, 1.2112(a); see also *Wireless Telecommunications Bureau Answers Frequently Asked Questions Concerning Reporting of Ownership Information on FCC Form 602, Public Notice*, 14 FCC Rcd 8261, 8264-65 (WTB 1999).



### III. DESCRIPTION OF THE TRANSACTION

The proposed transaction involves the sale and assignment by NextWave of all of its rights and interests in (i) 10 or 20 MHz of spectrum to be disaggregated from twenty C Block PCS licenses acquired by NPCI in FCC Auctions 5 and 10, and (ii) fourteen 10 MHz F Block PCS licenses acquired by NPPI in FCC Auction 11 (these thirty-four licenses are collectively referred to herein as the "Designated Licenses"). In only two markets would 20 MHz be disaggregated, and Cingular will not hold more than 45 MHz in any of the markets post-consummation. The precise spectrum proposed for assignment is set forth below by application. Applications for the partial assignment of C Block licenses are listed first (grouped alphabetically by assignee), followed by applications for the full assignment of F Block licenses (also grouped alphabetically by assignee), as follows:

*Application 1 (ULS File No. 0001461949) (Lead Application). Partial Assignment from NextWave Personal Communications Inc to BellSouth Personal Communications, LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLF693	Gainesville, FL	BTA159	C3	10	1895-1900, 1975-1980	01/03/97	0000753724	04/21/03

*Application 2 (ULS File No. 0001462008). Partial Assignment from NextWave Personal Communications Inc. to Corpus Christi SMSA Limited Partnership.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLF676	El Paso, TX	BTA128	C4/C5	20	1900-1910, 1980-1990	01/03/97	0000753802	04/21/03

*Application 3 (ULS File No. 0001462060). Partial Assignment from NextWave Personal Communications Inc. to Florida Cellular Service, LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLF686	Lakeland, FL	BTA239	C3	10	1895-1900, 1975-1980	01/03/97	0000753721	04/21/03
KNLF680	Sarasota, FL	BTA408	C3	10	1895-1900, 1975-1980	01/03/97	0000753683	04/21/03
KNLF653	Tampa, FL	BTA440	C3/C4	20	1895-1905, 1975-1985	01/03/97	0000753718	04/21/03

*Application 4 (ULS File No. 0001462065) Partial Assignment from NextWave Personal Communications Inc. to Houston Cellular Telephone Company, L.P.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLF648	Houston, TX	BTA196	C5	10	1905-1910, 1985-1990	01/03/97	0000753625	04/21/03

*Application 5 (ULS File No. 0001462358) Partial Assignment from NextWave Personal Communications Inc. to Pacific Bell Wireless Northwest, LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLF812	Portland, OR	BTA358	C3	10	1895-1900, 1975-1980	01/03/97	0000753708	04/21/03

*Application 6 (ULS File No. 0001462360). Partial Assignment from NextWave Personal Communications Inc. to Pacific Telesis Mobile Services, LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLF645	Los Angeles, CA	BTA262	C3	10	1895-1900, 1975-1980	01/03/97	0000753783	04/21/03
KNLF651	San Diego, CA	BTA402	C3	10	1895-1900, 1975-1980	01/03/97	0000753740	04/21/03

*Application 7 (ULS File No. 0001462372) Partial Assignment from NextWave Personal Communications Inc. to Southwestern Bell Mobile Systems, LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLF674	Allentown, PA	BTA010	C3	10	1895-1900, 1975-1980	01/03/97	0000753787	04/21/03
KNLF652	Baltimore, MD	BTA029	C5	10	1905-1910, 1985-1990	01/03/97	0000753736	04/21/03
KNLF646	Boston, MA	BTA051	C5	10	1905-1910, 1985-1990	01/03/97	0000753594	04/21/03
KNLF689	Hagerstown, MD	BTA179	C3	10	1895-1900, 1975-1980	01/03/97	0000753685	04/21/03
KNLF678	Manchester, NH	BTA274	C3	10	1895-1900, 1975-1980	01/03/97	0000753686	04/21/03
KNLF683	Portland, ME	BTA357	C3	10	1895-1900, 1975-1980	01/03/97	0000753687	04/21/03
KNLF684	Poughkeepsie, NY	BTA361	C3	10	1895-1900, 1975-1980	01/03/97	0000753788	04/21/03
KNLF647	Washington, DC	BTA461	C5	10	1905-1910, 1985-1990	01/03/97	0000753709	04/21/03

*Application 8 (ULS File No. 0001462378). Partial Assignment from NextWave Personal Communications Inc. to Southwestern Bell Wireless, LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLF696	Joplin, MO	BTA220	C3	10	1895-1900, 1975-1980	01/03/97	0000753622	04/21/03
KNLF679	Springfield, MO	BTA428	C3	10	1895-1900, 1975-1980	01/03/97	0000753706	04/21/03
KNLF691	Temple, TX	BTA441	C3	10	1895-1900, 1975-1980	01/03/97	0000753807	04/21/03

*Application 9 (ULS File No. 0001462417). Full Assignment from NextWave Power Partners Inc. to BellSouth Mobility LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLH204	Atlanta, GA	BTA024	F	10	1890-1895, 1970-1975	04/28/97	0000936612	04/21/03

*Application 10 (ULS File No. 0001462499). Full Assignment from NextWave Power Partners Inc. to Pacific Telesis Mobile Services, LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLH209	Las Vegas, NV	BTA245	F	10	1890-1895, 1970-1975	04/28/97	0000963133	04/21/03
KNLH207	Sacramento, CA	BTA389	F	10	1890-1895, 1970-1975	04/28/97	0000972972	04/21/03
KNLH200	San Francisco, CA	BTA404	F	10	1890-1895, 1970-1975	04/28/97	0000936562	04/21/03

*Application 11 (ULS File No. 0001462500) Full Assignment from NextWave Power Partners Inc. to SBC Wireless LLC*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLH208	Salt Lake City, UT	BTA399	F	10	1890-1895, 1970-1975	06/27/97	0000914013	04/23/03

*Application 12 (ULS File No. 0001462559). Full Assignment from NextWave Power Partners Inc. to Southwestern Bell Mobile Systems, LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLF938	Chicago, IL	BTA078	F	10	1890-1895, 1970-1975	04/28/97	0000936621	04/21/03
KNLH213	Harrisburg, PA	BTA181	F	10	1890-1895, 1970-1975	04/28/97	0000963139	04/21/03
KNLH229	Kankakee, IL	BTA225	F	10	1890-1895, 1970-1975	04/28/97	0000912263	04/21/03
KNLH217	Lancaster, PA	BTA240	F	10	1890-1895, 1970-1975	04/28/97	0000917416	04/21/03
KNLH220	Reading, PA	BTA370	F	10	1890-1895, 1970-1975	04/28/97	0000963103	04/21/03
KNLH227	Salisbury, MD	BTA398	F	10	1890-1895, 1970-1975	04/28/97	0000936573	04/21/03
KNLH218	York, PA	BTA483	F	10	1890-1895, 1970-1975	04/28/97	0000963111	04/21/03

*Application 13 (ULS File No. 0001462570) Full Assignment from NextWave Power Partners Inc. to Southwestern Bell Wireless, LLC.*

Call Sign	Market	BTA	Block	MHz	Frequencies	License Grant Date	5-Yr Build-Out File Number	Build-Out Notification Grant Date
KNLH203	Dallas, TX	BTA101	F	10	1890-1895, 1970-1975	06/27/97	0000963156	04/21/03
KNLH222	Tyler, TX	BTA452	F	10	1890-1895, 1970-1975	04/28/97	0000955021	04/21/03

As shown in the tables above, each of the Designated Licenses was granted more than five years ago, and the relevant five-year construction requirements of Section 24.203 of the Commission's rules have been satisfied with respect to each of the Designated Licenses.<sup>6</sup> Thus, assignment of the Designated Licenses is not restricted and the reporting requirements contained in Section 1.2111(a) are inapplicable.<sup>7</sup>

The Purchase Agreement between NextWave and Cingular calls for the Designated Licenses to be assigned to Cingular "free and clear of all Encumbrances" in exchange for \$1.4

<sup>6</sup> The Commission's Universal Licensing System shows all of the listed five-year construction notifications as having been timely filed and granted. With respect to the disaggregated C Block PCS spectrum for which a ten-year benchmark is also applicable, the disaggregatee will be responsible for meeting the ten-year construction benchmark for the disaggregated spectrum. See 47 C.F.R. §§ 24.203(a), 24.714(e)(2). The disaggregator thus remains responsible for meeting the ten-year construction benchmark in the spectrum it retains. The parties have chosen Option 3 in response to Question 7 of the Schedule B to represent this scenario based upon prior guidance from FCC staff. The parties request that the Commission issue a new call sign for each license comprising disaggregated C Block spectrum.

<sup>7</sup> See 47 C.F.R. §§ 1.2111(a), 24.839(a)(1)(6), see also *Northcoast Communications, LLC and Celco Partnership d/b/a Verizon Wireless*, 18 FCC Rcd 6490, 6492-93 ¶ 7 & n 19 (WTB/CWD 2003) ("Northcoast-VZW Order").

billion (the "Purchase Price").<sup>8</sup> At the same time the Purchase Agreement was executed, NextWave, the United States Government (on behalf of the Commission), the DIP Lender and the NextWave Creditors' Committee entered into the Term Sheet. Both the Purchase Agreement and the Term Sheet call for Cingular to pay, upon the consummation of the proposed transaction and subject to the FCC's approval of this application, a portion of the \$1.4 billion Purchase Price for the Designated Licenses (the sum of \$714 million (the "FCC Direct Payment")) directly to the U.S. Treasury, for the benefit of the FCC, on behalf of NextWave in full satisfaction of all claims of the FCC relating to the Designated Licenses. Under the Term Sheet, at that time, NextWave on the one hand, and the FCC and the United States Government on the other, will grant to each other mutual general releases from any and all claims relating to the Designated Licenses.<sup>9</sup>

As noted above, the United States Department of Justice has approved the Term Sheet in its entirety, including (i) the release of the Commission's claims against NextWave and the acceptance of the FCC Direct Payment in full satisfaction of all claims the United States may have related to the Designated Licenses, including but not limited to any claims for debt related to such licenses and (ii) the release by NextWave and its creditors of any claims they may have related to such licenses. In addition, as contemplated in the Purchase Agreement, the Bankruptcy Court has approved both the sale of NextWave's rights and interests in the Designated Licenses on the terms set forth in the Purchase Agreement and the agreements and settlements made in the Term Sheet, including the payment of the FCC Direct Payment to the U.S. Treasury in full satisfaction of all claims of the U.S. Government (including the FCC) relating to the Designated Licenses.<sup>10</sup> In the Bankruptcy Sale Order, the Bankruptcy Court found that "[a]pproval at this time of the Purchase Agreement and the FCC Term Sheet and the consummation of the transactions contemplated thereby is in the best interests of Debtors, their creditors and their estates."<sup>11</sup> Thus, both the Department of Justice and the Bankruptcy Court have approved the Term Sheet and concurred with the determination represented thereby that the FCC Direct Payment is an acceptable resolution of all amounts due for the Designated Licenses.

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<sup>8</sup> The term "Encumbrance" is defined in the Purchase Agreement as follows: "any lien (including, without limitation, any tax lien), claim, interest, charge, security interest, lease, mortgage, pledge, easement, right of use, first offer or first refusal, conditional sale or other title retention agreement, defect in title, covenant or other restriction of any kind, other than those conditions imposed upon licenses and licensees generally by the Communications Act and the FCC's rules, regulations and policies promulgated thereunder. For the avoidance of doubt, any and all amounts owed to any Governmental Body payable under or in connection with applicable law, including, but not limited to, all payments payable under or in connection with 47 C.F.R. §§ 1.2111 and 24.714, to the extent not satisfied in full at or prior to the Closing, shall constitute an 'Encumbrance'."

<sup>9</sup> See Term Sheet at ¶¶ 3(a), 3(b)

<sup>10</sup> See Bankruptcy Sale Order at ¶¶ 10, 17, 19, Ordering Clauses

<sup>11</sup> See Bankruptcy Sale Order at ¶ 12

#### IV. COMMISSION APPROVAL OF THE PROPOSED TRANSACTION IS IN THE PUBLIC INTEREST

Under Section 310(d) of the Communications Act of 1934, as amended, the Designated Licenses may not be assigned unless the Commission finds "that the public interest, convenience and necessity will be served thereby."<sup>12</sup> As demonstrated below, the requisite finding can be easily made in this case.

In evaluating assignment applications under Section 310(d), the Commission must determine that the proposed assignee is qualified to hold Commission licenses, but it does not re-evaluate the qualifications of the assignor "unless issues relating to its basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant designation for hearing."<sup>13</sup> Although NextWave's qualifications have been the subject of challenges at various times, none of these challenges has ever given rise to a hearing designation order, and all have either been dismissed or withdrawn.<sup>14</sup> Moreover, the Commission has determined that NextWave is qualified to be a Commission licensee.<sup>15</sup> Thus, there is no question that NextWave possesses the qualifications necessary to hold the Designated Licenses.

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<sup>12</sup> 47 U.S.C. § 310(d).

<sup>13</sup> *Northcoast-VZW Order*, 18 FCC Rcd at 6492 ¶ 5 (citing *VoiceStream Wireless Corporation, PowerTel, Inc. and Deutsche Telekom AG*, 16 FCC Rcd 9779, 9790 ¶ 19 (2001); *Vodafone AirTouch, Plc. and Bell Atlantic Corporation*, 15 FCC Rcd 16507, 16513 ¶ 14 (WTB and IB 2000); *Pacific Wireless Technologies, Inc. and Nextel of California, Inc.*, 16 FCC Rcd 20341, 20343 ¶ 7 (WTB 2001), *Motorola, Inc.*, 16 FCC Rcd 8451, 8455 ¶ 7 & n.23 (WTB 2001) (and additional citations therein)).

<sup>14</sup> See *Wireless Telecommunications Bureau Commercial Wireless Division Approves Settlement Request and Dismisses Two Applications for Review*, Public Notice, 18 FCC Rcd 10634 (WTB/CWD 2003) (dismissing applications for review filed by Antigone Communications Limited Partnership and PCS Devco, Inc.); *T-Mobile USA, Inc., Request to Withdraw Certain Pleadings*, Letter from Linda C. Ray, Deputy Chief, WTB/CWD Policy & Rules Branch, to Robert A. Calaff, Senior Corporate Counsel - Governmental & Industry Affairs, T-Mobile USA, Inc., 18 FCC Rcd 7042 (WTB/CWD/PRB 2003); *NextWave Personal Communications Inc. and NextWave Power Partners Inc.*, Letter from Linda C. Ray, Deputy Chief, WTB/CWD Policy & Rules Branch, to John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless, 18 FCC Rcd 7039 (WTB/CWD/PRB 2003), *Request of Alaska Native Wireless, L.L.C. for Approval to Withdraw Certain Pleadings*, Letter from Linda C. Ray, Deputy Chief, WTB/CWD Policy & Rules Branch, to Michele C. Farquhar, Esq., 18 FCC Rcd 7036 (WTB/CWD/PRB 2003). In addition, the Wireless Telecommunications Bureau and International Bureau jointly found in a recent order that NextWave has complied with licensing conditions relating to its foreign ownership. See *NextWave Personal Communications Inc.*, 18 FCC Rcd 14487 (WTB and IB 2003).

<sup>15</sup> See *Wireless Telecommunications Bureau Announces Conditional Grant Of Broadband Personal Communications Services Entrepreneurs' C Block Licenses To NextWave Personal Communications, Inc. - Final Down Payment due by January 10, 1997*, Public Notice, DA 97-12 (WTB rel. Jan. 3, 1997); *Applications of NextWave Personal Communications Inc. for Various C Block Broadband PCS Licenses*, 12 FCC Rcd 2030 (WTB 1997), see also *NextWave Personal Communications Inc.*, 18 FCC Rcd 14487 (WTB and IB 2003).

As noted above, Cingular is a licensee in good standing and its qualifications to hold Commission licenses are a matter of public record.<sup>16</sup> Therefore, there is no question that Cingular possesses the qualifications needed to have the Designated Licenses assigned to it.

**A. The Proposed Transaction Would Further the Public Interest.**

Commission approval of the proposed transaction will promote the public interest in three principal ways. First, by enabling the Designated Licenses to be assigned to Cingular out of bankruptcy, the Commission will allow spectrum that has been the subject of litigation for over five years to be quickly put into general commercial use to benefit wireless consumers.<sup>17</sup> Second, in the markets in which Cingular currently holds no spectrum, the proposed transaction will expand its national footprint<sup>18</sup> and add a competitor to the market, giving consumers increased choice among wireless competitors and access to the wide array of state-of-the-art voice and data products and services that Cingular offers. Third, in markets where Cingular currently offers service, the proposed transaction will allow Cingular to expand its network capacity and services. By easing spectrum constraints in these markets, Cingular will be able to achieve operational efficiencies and offer a more robust range of services to meet the needs of new and existing subscribers.<sup>19</sup>

The BTAs involved in this transaction cover a population of approximately 83 million and include many of the largest metropolitan areas in the United States, including Los Angeles, Chicago, Boston, Atlanta, Washington, Dallas, Houston, San Diego and San Francisco. Although NextWave has satisfied the relevant construction benchmarks for the Designated Licenses, it is reorganizing under bankruptcy protection and is awaiting completion of that reorganization to expand its network operations. Cingular is a nationwide carrier with substantial experience in the wireless industry and has the necessary resources to use the spectrum in its commercial operations immediately. The public will therefore realize more immediate benefit from use of the spectrum through its deployment by Cingular into full commercial operations. In addition, assignment of the Designated Licenses will not affect NextWave's continued operation of its wireless networks in markets where it retains licenses, and will facilitate its plans to expand its operations in those markets.

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<sup>16</sup> See *supra* Section II.B

<sup>17</sup> Moreover, by enabling the parties to consummate the court-approved bankruptcy sale for the benefit of creditors, grant of these assignment applications will further "the equitable purposes of the Federal Bankruptcy Act." See *Space Station System Licensee, Inc. and Iridium Constellation LLC*, 17 FCC Rcd 2271, 2289 ¶ 44 (IB 2002) ("*Space Station-Iridium Order*"). As noted above, in the Bankruptcy Sale Order, the Bankruptcy Court found approval of the Purchase Agreement and Term Sheet to be in the best interests of NextWave, its creditors (including the U.S. government) and its estate. See *supra* note 11 and accompanying text.

<sup>18</sup> The Commission has already determined that the goal of nationwide service is in the public interest. See, e.g., *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fifth Report*, 15 F.C.C.R. 17660, 17669 (2000).

<sup>19</sup> See *Northcoast-VZW Order*, 18 FCC Rcd at 6493 ¶ 10

As shown in Attachment 1, Table 1, the spectrum to be acquired largely overlaps with Cingular's existing licenses with the exception of two markets, the Portland, Maine BTA and the Salisbury, Maryland BTA, as well as nearly twenty counties in other BTAs where Cingular does not currently hold spectrum.<sup>20</sup> By allowing Cingular to expand its nationwide footprint into these areas, the proposed transaction will increase consumer choice; a new facilities-based competitor will be entering those markets.<sup>21</sup> This expansion also will take advantage of Cingular's nationwide economies of scale and scope such as greater purchasing and billing system efficiencies, reductions in roaming costs, and reductions in common expenses.<sup>22</sup>

In Cingular's existing markets, the additional spectrum to be acquired in the proposed transaction will enhance Cingular's ability to be a more effective competitor and further its deployment of advanced wireless (or 3G) services. Integrating NextWave's spectrum into Cingular's existing network would enable Cingular to increase its system capacity, better accommodate its overall growth, and provide additional products and services to the public.<sup>23</sup> It will also facilitate Cingular's overlay of GSM/GPRS over its network.

#### **B. The Proposed Transaction Creates No Competitive Harm.**

The proposed transaction will have no anticompetitive effects. It will neither cause an aggregation of spectrum that would pose an anticompetitive risk nor reduce actual competition in any market.

##### **1. Spectrum Aggregation**

Cingular proposes to acquire 10 or 20 MHz of PCS spectrum in thirty-four BTAs. In twenty of these BTAs, NextWave will disaggregate and partially assign C Block spectrum to Cingular and will retain the remainder of its spectrum holdings. In the other fourteen BTAs, NextWave will assign F Block licenses encompassing 10 MHz of PCS spectrum. As shown in Attachment 1, Table 1, the transaction will not create any new or unresolved overlaps in

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<sup>20</sup> Importantly, in the Hagerstown, MD, Manchester, NH, and El Paso, TX BTAs, Cingular holds licenses covering only the rural counties in these markets and not the major population centers. Cingular also does not control any spectrum in the Portland, OR BTA but has included the spectrum held by Salmon PCS for purposes of the overlap analysis because Cingular holds a greater-than-10-percent ownership interest in this entity. See Attachment 1, Table 1

<sup>21</sup> Cingular uses TDMA and GSM networks to deliver high quality digital voice, messaging, and data products and continues to improve its service offerings through the deployment of next-generation network technologies. As recently noted by the Commission, Cingular has deployed GSM/GPRS covering 50 percent of its POPs and plans to reach 90 percent during 2003, and 100 percent in 2004. Cingular also plans to launch service over EDGE networks in selected markets during the third quarter of 2003. *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 02-379, *Eighth Report*, 18 FCC Rcd 14783, ¶ 74 (2003)

<sup>22</sup> *Eighth Report* at ¶ 41

<sup>23</sup> The Commission recently recognized the public interest benefits that result from increased system capacity. See, e.g., *Northcoast-VZW Order*, 18 FCC Rcd at 6493 ¶ 10



Cingular's ownership interests that implicate the former 55 MHz Commercial Mobile Radio Services ("CMRS") spectrum cap.<sup>24</sup>

With the exception of certain counties in the El Paso, Texas and Springfield, Missouri BTAs in which Cingular will hold 45 MHz of spectrum post-consummation, Cingular will hold 35 MHz or less in the markets subject to this transaction post-consummation. In the Portland, Maine BTA and the Salisbury, Maryland BTA, there will not be any overlap because Cingular does not hold any spectrum in these two markets. In several of the BTAs, there are specific counties in which Cingular is not authorized, and the transaction also will not result in any overlaps in these areas.<sup>25</sup> Because Cingular will hold far less than thirty percent of the spectrum available to support mobile telephony in any given area, the transaction will not threaten competitive harm in the spectrum input market.<sup>26</sup>

## 2. Number of Competitors

The overall number of competitors will remain the same in nineteen of the twenty markets that involve partial assignments. One partial assignment will even allow Cingular to enter the Portland, Maine BTA, thereby adding a facilities-based competitor to that market. Moreover, by strengthening NextWave's ability to complete its bankruptcy reorganization, the transaction will enhance NextWave's ability to expand its operations and compete in the markets where it will retain spectrum.

In the other fourteen markets where NextWave proposes to assign all 10 MHz of its F Block spectrum to Cingular, competition will not be diminished. The number of competitors in the Salisbury, MD BTA will not be affected adversely because Cingular does not hold any spectrum in this market. The transaction will allow a nationwide carrier to enter this market. In the other thirteen BTAs, an estimated 6-9 competitors will remain following consummation, including Cingular. These competitors include well-established national and regional operators that will ensure a high degree of competition in these markets.<sup>27</sup> Moreover, the transaction will not affect the number of currently active competitors in any of the markets involved given the fact that NextWave currently has limited operations and trial (non-paying) customers in these

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<sup>24</sup> See 47 C.F.R. § 20.6(a), (f), Attachment 1, Table 1.

<sup>25</sup> See Attachment 1, Table 1

<sup>26</sup> See 2000 Biennial Regulatory Review *Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, *Report and Order*, 16 F.C.R. 22668, 22707 ¶ 67 (2001); see also *Northcoast-VZW Order*, 18 FCC Rcd at 6493-94 ¶¶ 9-14 (finding no undue anticompetitive harm in a carrier holding 55 MHz or less in any given market being acquired)

<sup>27</sup> See Attachment 1, Table 2, see also *Northcoast-VZW Order*, 18 FCC Rcd at 6493-94 ¶ 12 (finding that, with six competitors operating in an area, a transaction will result in no harm to rates and/or service), *Wireless Telecommunications Bureau Grants Consent for the Assignment of Licenses to AT&T Wireless Services, Inc., Cingular Wireless LLC, Meriwether Communications LLC, and Skagit Wireless, LLC*, Public Notice, 18 FCC Rcd 9975 (WTB 2003) (approving transaction that resulted in the elimination of an actual competitor where five actual competitors remained in the market)

markets.<sup>28</sup> For all the reasons stated above, the proposed transaction should raise no competition concerns for the Commission.

**V. REQUEST FOR A STATEMENT REGARDING, OR WAIVERS OF, SECTIONS 1.2111 AND 24.714 OF THE COMMISSION'S RULES**

**A. Background**

A portion of the \$1.4 billion Purchase Price in the proposed transaction (*i.e.*, the FCC Direct Payment of \$714 million) will be paid directly to the FCC in full satisfaction of NextWave's debt to the government relating to the Designated Licenses. The amount of the FCC Direct Payment was determined through arms'-length negotiations between NextWave and the Commission, which led to the execution of the Term Sheet resolving their respective claims relating to the Designated Licenses.<sup>29</sup> As such, the FCC Direct Payment reflects a negotiated settlement between the Commission and NextWave as to claims regarding the Designated Licenses. As noted above, the Term Sheet (including the amount of the FCC Direct Payment) has been approved both by the U.S. Department of Justice under the Debt Collection Improvement Act<sup>30</sup> and by the Bankruptcy Court. Under the Purchase Agreement, certain conditions must be satisfied before Cingular will be required to perform its obligation to consummate the proposed transaction.<sup>31</sup> Among these is a condition that the Commission's approval of these applications either "(a) waive the full payment requirements and all other conditions under 47 C.F.R. § 1.2111 and § 24.714, subject to delivery of the FCC Direct Payment as contemplated in this Agreement (including the timing for such FCC Direct Payment), or (b) state that delivery of the FCC Direct Payment as contemplated in this Agreement (including the timing for such FCC Direct Payment) constitutes full payment, and satisfies all conditions, required under 47 C.F.R. § 1.2111 and § 24.714 . . . ."<sup>32</sup>

The Applicants respectfully request that the Commission, as part of its approval of the instant applications, either grant waivers of Sections 1.2111 and 24.714 of its rules to the extent

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<sup>28</sup> See *Northcoast-VZW Order*, 18 FCC Rcd at 6493 ¶ 11 ("In forty of the forty-one BTAs in which Verizon Wireless currently provides services, Northcoast has no customers and is engaged in no marketing efforts. Thus, there will be no loss of an *actual* competitor in these areas.").

<sup>29</sup> See Bankruptcy Sale Order at ¶ 15.

<sup>30</sup> Authority to approve forgiveness of debt owed to the government where the forgiveness exceeds \$100,000 resides with the Justice Department under the Debt Collection Improvement Act. See 31 U.S.C. § 3711 and 31 C.F.R. § 902.1.

<sup>31</sup> See Article VII of the Purchase Agreement.

<sup>32</sup> Section 7.3 of the Purchase Agreement. The phrase "the timing for such FCC Direct Payment" refers to Purchase Agreement's contemplation that the payment will be made on the date of the closing of the transaction, which will be no more than ten (10) business days after the fulfillment or waiver of the Applicants' respective conditions to closing set forth in Articles VII and VIII of the Purchase Agreement. Among these conditions is that the Commission's order approving these applications has become a Final Order (as defined in Section 11.3 of the Purchase Agreement).

such waivers are necessary to legally consummate the proposed transaction, or explicitly state that delivery of the FCC Direct Payment as contemplated in this Agreement (including the timing for such FCC Direct Payment) constitutes full payment, and satisfies all conditions, required under Sections 1.2111 and 24.714. If the Commission determines that waivers are needed, the Applicants submit that the requested waivers are fully justified under Section 1.925(b)(3) of the Commission's rules and the applicable precedent as shown below.

**B. The Applicable Rules and Waiver Standards**

Because the Commission offered an installment financing program to "entrepreneurs" who were eligible to bid on C and F Block PCS licenses, it also adopted rules to prevent "unjust enrichment" if these entrepreneurs were to resell those licenses.<sup>33</sup> These unjust enrichment rules are now codified in Section 1.2111 of the Commission's rules.<sup>34</sup> Section 1.2111(c)(1) of the Commission's rules states:

If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.<sup>35</sup>

The Commission permits CMRS licensees to partition their licensed service areas and to disaggregate spectrum,<sup>36</sup> and in the proposed transaction, NextWave would disaggregate to

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<sup>33</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2384-85 ¶¶ 210-15, 2394-95 ¶¶ 258-65 (1994) ("Competitive Bidding Second R&O")

<sup>34</sup> The Applicants believe that the only payments applicable here are those under Section 1.2111(c) relating to installment financing. In certain circumstances, the Commission requires the repayment of bidding credits utilized by entrepreneurs who seek to assign or transfer control of C and F Block licenses. See 47 C.F.R. § 1.2111(d). The C Block spectrum at issue here is exempt from bidding credit repayment because it was awarded in FCC Auctions 5 and 10. See *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, 15 FCC Rcd 16266, 16290-91 (2000). Moreover, under Section 1.2111(d)(2), the amount of any bidding credit repayment is determined by the "year of the license term" in which the transfer takes place. Because each of the Designated Licenses has already passed the five-year mark in its license term, no repayment of bidding credit is due here. See 47 C.F.R. § 1.2111(d)(2)(i)(E). Finally, the FCC Direct Payment, as agreed to in the Term Sheet, represents full payment of all amounts owed to the government relating to the Designated Licenses.

<sup>35</sup> 47 C.F.R. § 1.2111(c)(1). Because the rule calls for an interest calculation to be made "through the date of assignment," the Commission typically conditions its approval "upon full payment of any required unjust enrichment payments on or before the consummation date." See, e.g., *Northcoast-VZW Order at ¶ 16; Applications of Chadmoore Wireless Group, Inc. and Various Subsidiaries of Nextel Communications, Inc.*, 16 FCC Rcd 21105, 21113 ¶ 23 (WTB 2001).

<sup>36</sup> See 47 C.F.R. § 24.714, *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees and Implementation of Section 257 of the Communications Act – Elimination of Market Barriers*, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21831 (1996).

Cingular 10 or 20 MHz of spectrum from twenty C Block PCS licenses. Two different unjust enrichment rules, which are generally consistent in their intent, appear to apply to disaggregations of PCS spectrum:

- Section 1.2111(e)(1) of the Commission's rules provides, in pertinent part, that "[l]icensees making installment payments, that . . . disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in this section."<sup>37</sup>
- Section 24.714(c)(2)(ii) requires that "[t]he . . . disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire pro rata amount within 30 days of Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in a rescission of the grant of the partial assignment application."<sup>38</sup>

Despite Section 1.2111(e)'s clear indication that unjust enrichment payment obligations relating to disaggregations are within the ambit of Section 1.2111, Section 24.714 of the Commission's rules employs somewhat different provisions to require payments if PCS spectrum is disaggregated to non-entrepreneurs.

The Designated Licenses were granted to NextWave in January, April and June 1997, under the Commission's installment payment program. The unpaid principal remaining on the promissory notes applicable to the Designated Licenses is approximately \$687 million.<sup>39</sup> The FCC Direct Payment is more than sufficient to cover that entire principal amount. NextWave's bankruptcy and the attendant litigation have made the determination of the amount that may be due for the Designated Licenses unclear. In addition, the uncertainties inherent in bankruptcy proceedings and in resolving this amount absent the Term Sheet make it impossible to predict the total amount that the Commission would recover if the resolution of the amount of debt owed were determined and addressed in connection with NextWave's eventual plan of reorganization. It is, however, clear that in agreeing to accept the FCC Direct Payment (as determined in the Term Sheet) in resolution and satisfaction of all claims regarding the Designated Licenses, the government is agreeing to receive an amount that may vary from the amount that might otherwise be determined to be payable under Sections 1.2111 and 24.714 in less unique circumstances. Thus, the Applicants respectfully request that the Commission, as part of its approval of the instant applications, either grant partial waivers of Sections 1.2111 and 24.714 of its rules to the extent such waivers are necessary to legally consummate the proposed transaction, or, in the alternative, explicitly state that delivery of the FCC Direct Payment as contemplated in this Agreement (including the timing for such FCC Direct Payment) constitutes full payment, and satisfies all conditions, required under Sections 1.2111 and 24.714.

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<sup>37</sup> 47 C.F.R. § 1.2111(e)(1).

<sup>38</sup> 47 C.F.R. § 24.714(c)(2)(ii).

<sup>39</sup> The outstanding principal balance owed with respect to the C Block licenses from which spectrum is proposed to be disaggregated has been apportioned in accordance with Section 24.714(c)(1) of the Commission's rules.

In general, Commission rules may be waived upon a showing that there is "good cause" to do so.<sup>40</sup> Waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.<sup>41</sup> Circumstances that would justify a waiver include "considerations of hardship, equity, or more effective implementation of overall policy."<sup>42</sup> Waiver is also appropriate if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.<sup>43</sup> For PCS and other wireless providers, Section 1.925 of the Commission's rules codifies these general principles.<sup>44</sup>

The courts require that the Commission, when determining whether to grant a request to waive its rules, take a "hard look" at the request to ensure that a rule that generally serves the public interest is not rigidly applied where doing so in a particular case would not be in the public interest.<sup>45</sup> As demonstrated below, the "particular facts" in this case would make strict application of Sections 1.2111 and 24.714 "inconsistent with the public interest,"<sup>46</sup> therefore waiver of these rules is appropriate.

**C. The Commission's Standards for Granting Rule Waivers Are Satisfied in the Circumstances Presented Here.**

As shown below, in the unique circumstances presented here, the requested waiver is justified under Section 1.925(b)(3)(ii) of the Commission's rules because rigid application of the unjust enrichment rules would be contrary to the public interest

The settlement memorialized among the FCC, NextWave, the DIP Lender and the NextWave Creditors' Committee in the Term Sheet makes possible the crucial first step toward resolving NextWave's complicated bankruptcy proceedings and the government's claims regarding NextWave's licenses. This settlement will allow Cingular to acquire all of NextWave's rights and interests in the Designated Licenses, free and clear of all Encumbrances (as defined in the Purchase Agreement), which in turn will allow valuable PCS spectrum to be quickly put into

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<sup>40</sup> See 47 C.F.R. §13, see also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT Radio*"); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

<sup>41</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>42</sup> *WAIT Radio*, 418 F.2d at 1159

<sup>43</sup> See *id.*, 418 F.2d at 1157

<sup>44</sup> Section 1.925(b)(3) states that the Commission may grant rule waivers "if it is shown that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." 47 C.F.R. § 1.925(b)(3)

<sup>45</sup> See *WAIT Radio*, 413 F.2d at 1157

<sup>46</sup> *Northeast Cellular*, 897 F.2d at 1166

use for the general benefit of the public. In addition, the FCC Direct Payment, determined through negotiation of the Term Sheet, (i) represents a definite recovery for taxpayers of more than the aggregate (pro rata) unpaid balance of the original amounts bid for the spectrum by NextWave and (ii) avoids the uncertainties inherent in having the government's and NextWave's claims relating to the Designated Licenses resolved through the bankruptcy process. However, neither the Term Sheet nor the proposed transaction can be effectuated without Commission approval of the instant application in its entirety. As demonstrated below, the requested partial waivers of the unjust enrichment payment rules are fully justified under Section 1.925(b)(3)(ii) and should be granted.

**1. Rigid Application of the Unjust Enrichment Rules Would Be Contrary to the Public Interest in These Circumstances.**

**a. The circumstances here are unique.**

The circumstances surrounding NextWave and the proposed transaction are unique. The case has involved regulatory, judicial and legislative proceedings spanning more than seven years before the FCC, a federal bankruptcy court, a federal district court, two U.S. Courts of Appeals, the United States Supreme Court, and the U.S. Congress. In and of itself, this history demonstrates the unique nature of the circumstances giving rise to these applications.

Furthermore, the facts of NextWave's history are unique. In FCC Auctions 5 and 10, which concluded in May and July 1996, respectively, NextWave was declared the high bidder for 63 C Block PCS licenses.<sup>47</sup> NextWave was also the high bidder for 27 F Block licenses put up for bid in FCC Auction 11, which concluded in January 1997.<sup>48</sup> After addressing challenges to NextWave's qualifications, the Commission issued C Block licenses to NextWave in January 1997, subject to compliance with certain conditions.<sup>49</sup> Subsequently, difficulties in raising needed capital led holders of C Block licenses to seek modification of their payment structures from the Commission.<sup>50</sup> The Commission suspended interest payments on C Block licenses on the first date that such payments would have been due from NextWave, and (with Department of Justice approval) subsequently offered all C Block licensees a variety of options for

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<sup>47</sup> *Entrepreneur's C Block Auction Closes - FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas*, Public Notice, DA 96-716 (rel. May 8, 1996); *Entrepreneur's C Block Reauction Closes - FCC Announces Winning Bidders in the Reauction of 18 Licenses to Provide Broadband PCS in Basic Trading Areas*, Public Notice, 11 FCC Rcd 8183 (1996).

<sup>48</sup> *D, E, and F Block Auction Closes - Winning Bidders in the Auction of 1,479 Licenses To Provide Broadband PCS in Basic Trading Areas*, Public Notice, DA 97-81 (rel. Jan. 15, 1997)

<sup>49</sup> See *Wireless Telecommunications Bureau Announces Conditional Grant Of Broadband Personal Communications Services Entrepreneurs' C Block Licenses To NextWave Personal Communications, Inc.-- Final Down Payment due by January 10, 1997*, Public Notice, DA 97-12 (WTB rel. Jan. 3, 1997); *Applications of NextWave Personal Communications Inc for Various C Block Broadband PCS Licenses*, 12 FCC Rcd 2030 (WTB 1997), see also, e.g., Radio Station Authorization, KNLF644, File No. 00-203-CW-L-96, at 2 (issued Jan. 3, 1997)

<sup>50</sup> See *Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues*, Public Notice, 12 FCC Rcd 24230 (WTB 1997)

restructuring.<sup>51</sup> NextWave sought bankruptcy protection under Chapter 11 on June 8, 1998, the effective date of the Commission rules restarting payment obligations.<sup>52</sup>

The ensuing litigation over NextWave's licenses has undergone complicated judicial proceedings, requiring resolution of novel legal issues through rulings by the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court.<sup>53</sup> The issues involved have been the subject of several Congressional hearings and a variety of legislative initiatives. Ultimately, in January of 2003, a U.S. Supreme Court decision resolved a key legal issue and thereby provided finality to the lengthy litigation process and the attendant public policy debate.<sup>54</sup>

The FCC has recognized that as a result of this unique set of circumstances, "some of the most valuable spectrum in the nation" has been the subject of complex disputes for years.<sup>55</sup> Indeed, because of the litigation, the FCC was unable to award the Auction 35 licenses and ultimately permitted the Auction 35 winners to dismiss their long-pending applications. In so doing, the FCC noted "the occurrence of a unique situation" where, among other things, spectrum was the subject of litigation for years.<sup>56</sup>

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<sup>51</sup> See *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Second Report and Order*, 12 FCC Rcd 16436 (1997), *recon.*, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998), *further recon.*, *Second Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 6571 (1999).

<sup>52</sup> *NextWave Personal Communications, Inc. et al.*, 235 B.R. 263 (Bankr. S.D.N.Y. 1998).

<sup>53</sup> See *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd*, 200 F.3d 43 (2d Cir. 1999), *cert. denied*, *NextWave Personal Communications, Inc. v. FCC*, 531 U.S. 924 (2000); *In re NextWave Personal Communications, Inc.*, 244 B.R. 253 (Bankr. S.D.N.Y. 2000), *rev'd*, *In re Federal Communications Commission*, 217 F.3d 125 (2d Cir. 2000), *cert. denied*, *NextWave Personal Communications, Inc. v. FCC*, 531 U.S. 1029 (2000); *NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001); and *Federal Communications Commission v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003). While litigation was pending, the Commission reaucted NextWave's spectrum in "Auction 35" (see *Auction of C and F Block Broadband PCS Licenses*, Public Notice, 15 FCC Rcd 693 (WTB 2000), *NextWave Personal Communications, Inc. and NextWave Power Partners Inc. (Petition for Reconsideration)*, *Order on Reconsideration*, 15 FCC Rcd 17500 (2000); *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, DA 01-211 (rel. Jan. 29, 2001)) and the government entered into a settlement (later terminated for failure to obtain implementing legislation from Congress) with NextWave and most of the winning bidders in the reauction. See *Settlement Agreement By and Among the United States of America, the Federal Communications Commission, NextWave Telecom Inc. and Certain Affiliates, and Participating Auction 35 Winning Bidders* (Nov. 15, 2001).

<sup>54</sup> *Federal Communications Commission v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003).

<sup>55</sup> Reply Brief for the Federal Communications Commission at 3, *Federal Communications Commission v. NextWave Personal Communications, Inc. et al.*, 535 U.S. 904 (2002) (No. 01-653).

<sup>56</sup> *Disposition of Down Payment and Pending Applications by Certain Winning Bidders in Auction No. 35, Requests for Refunds of Down Payments Made in Auction No. 35*, WT Docket No. 02-276, *Order and Order on Reconsideration*, 17 FCC Rcd 23354, 23362 ¶ 10 (2002).

This “unique situation” – where some of the most valuable spectrum covering much of the country has been subject to a cloud for several years – is highly unlikely to be repeated in the future. Now that the NextWave case has been decided by the Supreme Court, the law relating to the treatment of installment payment debt owed by licensees in bankruptcy is much clearer. Moreover, the Commission has eliminated the practice of affording installment financing to qualifying auction bidders, so licenses will not be awarded in future auctions until the winning bidders have made payment of the entire amount of their winning bids.<sup>57</sup>

**b. The public interest compels grant of the requested relief.**

The proposed transaction has been structured so that it will not be consummated, and Cingular will not make the FCC Direct Payment, unless (1) Cingular is assured that it will be assigned clear title to all of NextWave’s rights and interests in the Designated Licenses, without any cloud or claim on those rights and interests, (2) NextWave is assured that the government’s claims against the Designated Licenses have been released, and (3) the government is assured that any claims of NextWave or its creditors with respect to the Designated Licenses are also released.<sup>58</sup> These assurances will be present only if all agreements memorialized in the Term Sheet become effective and if the Commission grants the requested waivers or otherwise states that the FCC Direct Payment satisfies all unjust enrichment requirements. The FCC Direct Payment, as determined in the Term Sheet, represents a negotiated compromise designed to permit the Designated Licenses to be put immediately into full commercial use and obtain for the government a reasonable value on its claims regarding these licenses. By its terms, however, the Term Sheet will become effective only if the Commission approves the proposed transaction and the FCC Direct Payment is made by Cingular. Thus, absent grant of the requested relief, the FCC Direct Payment will not be made, the Term Sheet will not become effective, and the proposed transaction will unravel. For several reasons, such a result would disserve the public interest.

The Public’s Interest In Putting Spectrum To Use. Rigid application of Sections 1.2111 and 24.714 would prevent rapid deployment of services to the public over the spectrum covered by the Designated Licenses. The Commission originally awarded licenses to use these frequencies over six years ago, but they have not been put to widespread commercial use, preventing public enjoyment of wireless services provided over these frequencies.

When it authorized the Commission to use auctions to award spectrum licenses, the first specific objective Congress laid out for the Commission was to promote “the development and rapid deployment of new technologies, product, and services for the benefit of the public,

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<sup>57</sup> See *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, WT Docket No 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397 ¶ 38 (1997), *aff’d*, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15322 ¶ 55 (2000); see also Brief for the Federal Communications Commission in Opposition at 12, *NextWave Personal Communications Inc. et al v FCC*, 531 U.S. 1029 (2000) (No. 00-447) (stating that “the FCC has eliminated its installment payment program”)

<sup>58</sup> Indeed, the Applicants did not execute the Purchase Agreement until the Term Sheet had also been finalized and simultaneously executed



including those residing in rural areas, without administrative or judicial delays.”<sup>59</sup> Application of the Commission’s unjust enrichment rules to derail the proposed transaction would be a disservice to the public interest by further delaying the deployment of new services on the spectrum covered by the Designated Licenses, pending completion of NextWave’s reorganization proceedings. As discussed in Section IV above, Cingular’s use of the spectrum encompassed by the Designated Licenses will expand competition and consumer choice, as well as improve Cingular’s service and strengthen its position as a competitor in the marketplace. If the Commission were to strictly apply Sections 1.2111 and 24.714 in this case, the proposed transaction will not be consummated and the public interest benefits that would accompany Cingular’s use of this spectrum would be lost.

The Public’s Interest In Recovering Value On Its Spectrum Resource and In Achieving Certainty. Acting in its role as a creditor in the NextWave bankruptcy, the Commission agreed to the Term Sheet (albeit subject to DOJ approval and its own regulatory review of these applications), thereby recognizing (subject to its own regulatory review of this application) that the public’s interests will be served by accepting the FCC Direct Payment in full satisfaction of its claims in the bankruptcy case relating to these licenses. Granting the requested relief will allow recovery of \$714 million for the Designated Licenses. Absent such relief, the Designated Licenses will not be assigned in the near term from NextWave’s bankruptcy estates and taxpayers will be deprived of a definite and immediate return on the value of this spectrum. Instead, there will be continuing uncertainty over recovery on the Commission’s claims relating to the Designated Licenses and over NextWave’s potential claims against the government. It is unclear what amount the public would ultimately recover on its claims through the bankruptcy process. Simply put, in order for American taxpayers to recover \$714 million for the Designated Licenses, the Commission must grant the requested relief. Failure to do so would endanger achievement of the statutory goal of “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use . . . ”<sup>60</sup>

The Public’s Interest In Effectuating the Purposes of the Bankruptcy Code. As noted above, the Bankruptcy Court has found that “[a]pproval at this time of the Purchase Agreement and the FCC Term Sheet and the consummation of the transactions contemplated thereby is in the best interests of Debtors, their creditors, and their estates” and that “the proposed resolution of the claims between the FCC and the Debtors with respect to the Designated Licenses as detailed in the FCC Term Sheet, is fair and equitable . . . ”<sup>61</sup> The Commission has recognized that enabling parties to consummate court-approved bankruptcy sales for the benefit of creditors furthers “the equitable purposes of the Federal Bankruptcy Act.”<sup>62</sup> Grant of the requested relief would accommodate the purposes underlying the Bankruptcy Code

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<sup>59</sup> 47 U.S.C. § 309(j)(3)(A).

<sup>60</sup> 47 U.S.C. § 309(j)(3)(C)

<sup>61</sup> Bankruptcy Sale Order at ¶¶ 12, 25

<sup>62</sup> See *Space Station-Iridium Order*, 17 FCC Rcd at 2289 ¶ 44

**2. Grant of the Requested Waivers Would Not Frustrate the Purposes of the Unjust Enrichment Rules.**

Though not a part of the waiver standard of Section 1925(b)(3)(ii), the purposes underlying the unjust enrichment rules would not be frustrated by grant of the requested waiver. In 1993, when it authorized the Commission to award licenses through competitive bidding, Congress enacted Section 309(j)(4)(E) of the Communications Act, which directs the Commission, in prescribing competitive bidding regulations, to "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."<sup>63</sup> Congress was concerned that bidders afforded special advantages in auctions (*i.e.*, bidding credits and installment financing) would abuse those preferential measures. The Commission therefore promulgated unjust enrichment rules "intended to prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of our preference measures."<sup>64</sup>

The purposes of the unjust enrichment rules would not be frustrated by a grant of the relief requested here.<sup>65</sup> The Applicants do not seek to avoid making payments to the Commission in connection with the assignment of the Designated Licenses. To the contrary, the FCC Direct Payment was a key part of the Term Sheet that was expressly negotiated between NextWave and the Commission, was determined by the Department of Justice to be in the public's interest, and was found to be "fair and equitable" by the Bankruptcy Court. Congress intended, and the Commission promulgated, the unjust enrichment rules to ensure that designated entities are not able to acquire licenses with the aid of preference measures and then profit from the rapid sale of those licenses at market prices. Given the complex and lengthy history of the NextWave case, no legitimate claim can be made that the proposed transaction is not entirely consistent with the purposes behind the Commission's rules.

The Commission also intended the unjust enrichment rules to help ensure the prompt build-out of services.<sup>66</sup> Instead of frustrating this goal, to the extent a waiver of the unjust

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<sup>63</sup> 47 U.S.C. § 309(j)(4)(E)

<sup>64</sup> *Competitive Bidding Second R&O*, 9 FCC Rcd at 2394 ¶ 258, *see also id.* at 2394 ¶ 260 ("It would be unjust and inconsistent with the will of Congress for . . . preferred licensees to obtain a license with the government's help, transfer that license *after a short period of time* to an entity that was not entitled to special treatment at the auction, and appropriate for themselves the difference between the full market value of the license and the discounted price which they paid the government for that license.") (emphasis added)

<sup>65</sup> In fact, in the circumstances presented here, there can be no "unjust" enrichment because any enrichment that might occur as a result of the requested waiver comes only after the FCC Direct Payment has been approved by the Bankruptcy Sale Order

<sup>66</sup> *See Competitive Bidding Second R&O*, 9 FCC Rcd at 2385 ¶ 210 (noting that unjust enrichment safeguards were intended "to ensure prompt delivery of services (including to rural areas), rapid development of new services and technologies, development of competitive markets, and wide access to a variety of services"), *id.* at 2385 ¶ 212 (expressing concern that unjust enrichment rules were necessary to prevent post-auction changes in ownership that "have the potential to delay buildout and thereby delay the provision of service to the public")

enrichment rules is required, such waiver as requested here would actually further this purpose. Denial of the requested relief would impede the Designated Licenses being expeditiously put to widespread commercial use.

**3. The 30-Day Provision of Section 24.714(c)(2)(ii) Should Be Waived.**

With respect to the contemplated timing of the FCC Direct Payment, the Commission typically effectuates Section 1.2111 by conditioning its approval of a transaction on the full payment of all required unjust enrichment payments on or before the consummation date.<sup>67</sup> In contrast, Section 24.714(c)(2)(ii), if strictly construed, would require payment "within 30 days of Public Notice conditionally granting the partial assignment application." Under the Purchase Agreement, Cingular's obligation to consummate the transaction is conditioned, among other things, upon the Commission's approval becoming a Final Order (as defined in the Purchase Agreement). Because it is impossible for the Commission's approval to become a Final Order within 30 days of its issuance, the Applicants request that the Commission expressly waive the 30-day requirement of Section 24.714(c)(2)(ii) to allow for the FCC Direct Payment to be made on the date of consummation, as contemplated by the Purchase Agreement.

For all the reasons stated above, the Applicants respectfully request that, as part of its approval of the instant application, the Commission either grant waivers of Sections 1.2111 and 24.714 of its rules to the extent such waivers are necessary to legally consummate the proposed transaction, or explicitly state that delivery of the FCC Direct Payment as contemplated in this Agreement (including the timing for such FCC Direct Payment as set forth in Section 7.3 of the Purchase Agreement) constitutes full payment, and satisfies all conditions, required under Sections 1.2111 and 24.714.

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<sup>67</sup> See *supra* note 35